A

## AIMS CYBERJAYA SDN BHD v. AHMAD ZAHRI MIRZA ABDUL HAMID

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[CIVIL APPEAL NO: W-02(A)-287-02-2017]
29 NOVEMBER 2018

C ***LABOUR LAW:*** *Employment – Termination – Early release of employee – Whether without just cause or excuse – Whether employee employed by two separate legal entities – Whether employed for fixed term contract or continuous employment – Whether terms of contract specified – Whether contract lapsed by effluxion of time – Whether termination valid*

D ***CONTRACT:*** *Termination – Validity – Employment – Early release of employee – Whether terms of contract specified – Whether employee employed by two separate legal entities – Whether there was evidence of fraud or unconscionable conduct by employer warranting lifting of veil of incorporation – Whether contract lapsed by effluxion of time – Whether termination valid*

E The respondent had entered into a total of six contracts of employment, the first three contracts were with AIMS Data Centre 2 Sdn Bhd ('AIMS Data Centre 2'), while the fourth to the sixth contracts were with the appellant, AIMS Cyberjaya Sdn Bhd ('applicant'). The six employment contracts were: (i) the first contract: from 1 October 2009 (six months' probation) as a
F Consultant with AIMS Data Centre 2; (ii) the second contract: from 1 October 2009 to 30 September 2010, as a Consultant with AIMS Data Centre 2; (iii) the third contract: from 1 October 2009 (six months' probation) as Vice President, Product Development with AIMS Data Centre 2; (iv) the fourth contract: from 1 October 2012 to 30 September 2013 (12 months) as a Consultant with the applicant; (v) the fifth contract: from
G 1 October 2013 to 30 September 2014 (12 months) as Vice President, Products & Solutions with the applicant; and (vi) the sixth contract: from 1 October 2013 to 31 December 2013 (three months) as Vice President, Products & Solutions with the applicant. Sometime in September 2013 during the duration of the fourth contract, the respondent received a letter
H from the applicant offering him an appointment under the fifth contract. However, the respondent was unhappy with the terms of contract and thereafter, the applicant offered the sixth contract for a term of three months. According to the applicant, the three-month contract period was to provide the respondent time to reconsider the terms of the fifth contract. On
I 1 October 2013, the respondent informed the applicant that he was not accepting the fifth contract. Pursuant thereto, the applicant issued a letter dated 18 October 2013 which provided the respondent with an early release of his employment with effect from 19 October 2013. The respondent was

paid his full salary for the month of October 2013 as well as two months' salary for the balance of the remaining two months *viz* November and December *in lieu* of notice under the sixth contract. The respondent accepted the payments. The respondent thereafter made representations under s. 20 of the Industrial Relations Act 1967 for the matter to be referred to the Industrial Court. The Industrial Court delivered its decision in favour of the respondent. The applicant applied for an order of *certiorari* to quash the entire decision of the Industrial Court. The High Court Judge ('HCJ'), in dismissing the applicant's application, agreed with the finding of the Industrial Court that the respondent's contracts of employment with the applicant was a continuation of the respondent's contract of employment with AIMS Data Centre 2, with no change in the terms and conditions of the previous contract of employment with AIMS Data Centre 2 and the subsequent contracts of employment with the applicant. Hence, this appeal. The main issues raised by the applicant were on: (i) separate legal entity; (ii) whether the contracts of employment were fixed term contracts; and (iii) whether the respondent, a foreign national, could be a permanent employee.

**Held (allowing appeal with costs; setting aside decision of High Court)**
**Per Badariah Sahamid JCA delivering the judgment of the court:**

**(1)** The applicant and AIMS Data Centre 2 were two separate legal entities. Thus, the respondent's six contracts of employment from 1 October 2009 to 31 December 2013 with two separate legal entities could not be treated as one continuous contract with the applicant. The utilisation of the term 'renewal' and the non-change of terms and conditions of a subsequent contract to the previous contract did not result in a continuous employment as the material fact remained that both contracts were entered with two separate legal entities. Further, there was no evidence that the facts of the instant case demonstrated fraud or unconscionable conduct of the applicant and therefore, there were no grounds for the Industrial Court or the HCJ to lift the corporate veils of AIMS Data Centre 2 and the applicant to treat the two separate entities as one. (paras 13, 15 & 17)

**(2)** The first to third contracts of employment were between the respondent and AIMS Data Centre 2. The pertinent contracts of employment in this appeal were only between the applicant and the respondent, *ie*, the fourth to the sixth contracts and each of the three contracts stipulated the offer of appointment was for a specified period of time. Thus, the inescapable conclusion was that the employment contracts of the respondent with the applicant were fixed term contracts. A fixed term contract expires by effluxion of time. (paras 18 & 20)

**(3)** Prior to the expiry of the fourth contract with the applicant, the applicant had offered the respondent the fifth contract, which was not agreeable to the respondent. Therefore, at this point, the only subsisting contract between the respondent and the applicant was the

fourth contract. Subsequently, on 18 September 2013, prior to the expiry of the fourth contract, the respondent was offered the three-month contract for the period of 1 October 2013 to 31 December 2013. The respondent accepted the three-month contract on 20 September 2013. On 1 October 2013, when the respondent informed the applicant that he was not accepting the fifth contract, the subsisting contract, *ie*, the fourth contract, had already expired by effluxion of time. Therefore, only the three-month contract from 1 October 2013 to 31 December 2013 remained between the applicant and the respondent. It was during the duration of this three-month contract, on 18 October 2013, that the respondent had issued a letter of 'early release', giving the applicant two months' notice of expiry of the three months' contract with effect from 1 November 2013 to 31 December 2013. (paras 21 & 22)

**(4)** The HCJ, in concluding that the respondent's contract of employment with the applicant was a permanent contract, without examining the terms and conditions of the relevant contract which had expressly stipulated a fixed term contract with a termination clause that could be effected by either the applicant or the respondent, had committed error that warranted appellate intervention. The respondent was appointed under a fixed term contract of three months and the early termination of the respondent was effected in accordance with cl. 8 of the contract. (paras 25 & 26)

**(5)** The respondent was and is a citizen of Singapore. In Appendix A of the Tenure and Terms of the three-month contract, cl. 1(a) stipulated that the contract was 'subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia'. This would include the legal requirement to obtain a work permit from the relevant departments. Thus, an expatriate who required a work permit to work in Malaysia could not be a permanent employee. (paras 28 & 30)

***Bahasa Malaysia*** *Headnotes*

Responden memasuki sejumlah enam kontrak pekerjaan, tiga yang pertama dengan AIMS Data Centre 2 Sdn Bhd ('AIMS Data Centre 2'), manakala yang keempat hingga keenam dengan perayu, AIMS Cyberjaya Sdn Bhd ('pemohon'). Keenam-enam kontrak pekerjaan tersebut adalah: (i) kontrak pertama: dari 1 Oktober 2009 (tempoh percubaan enam bulan) sebagai Perunding dengan AIMS Data Centre 2; (ii) kontrak kedua: dari 1 Oktober 2009 hingga 30 Oktober 2010, sebagai Perunding dengan AIMS Data Centre 2; (iii) kontrak ketiga: dari 1 Oktober 2009 (tempoh percubaan enam bulan) sebagai Naib Presiden, Product Development dengan AIMS Data Centre 2; (iv) kontrak keempat: dari 1 Oktober 2012 hingga 30 Oktober 2013 (12 bulan) sebagai Perunding dengan pemohon; (v) kontrak kelima: dari 1 Oktober 2013 hingga 30 September (12 bulan) sebagai Naib Presiden, Products & Solutions dengan pemohon; dan (vi) kontrak keenam: dari 1 Oktober 2013 hingga 31 Disember 2013 (tiga bulan) sebagai Naib

Presiden, Products & Solutions dengan pemohon. Kira-kira pada September 2013, dalam tempoh kontrak keempat, responden menerima surat daripada pemohon menawarkan responden pelantikan bawah kontrak kelima. Walau bagaimanapun, responden tidak gembira dengan terma-terma kontrak tersebut dan kemudian, pemohon menawarkan kontrak keenam untuk tempoh tiga bulan. Menurut pemohon, kontrak tiga bulan adalah untuk memperuntukkan responden masa untuk mempertimbangkan semula terma-terma kontrak kelima. Pada 1 Oktober 2013, responden memaklumkan pemohon bahawa dia tidak menerima kontrak kelima. Oleh itu, pemohon mengeluarkan surat bertarikh 18 Oktober 2012 yang memberi responden pelepasan awal daripada pekerjaannya berkuat kuasa dari 19 Oktober 2013. Responden dibayar gaji penuh untuk bulan Oktober 2013 serta dua bulan gaji untuk baki bulan yang tinggal iaitu November dan Disember sebagai ganti notis bawah kontrak keenam. Responden menerima bayaran-bayaran tersebut. Responden kemudian membuat representasi bawah s. 20 Akta Perhubungan Perusahaan 1967 untuk perkara tersebut dirujuk ke Mahkamah Perusahaan. Mahkamah Perusahaan menyampaikan keputusannya berpihak pada responden. Pemohon memohon perintah *certiorari* untuk membatalkan keseluruhan keputusan Mahkamah Perusahaan. Hakim Mahkamah Tinggi ('HMT'), apabila menolak permohonan pemohon, menyetujui dapatan Mahkamah Perusahaan bahawa kontrak-kontrak pekerjaan responden dengan pemohon adalah sinambungan kontrak pekerjaan responden dengan AIMS Data Centre 2, tanpa perubahan dalam terma-terma dan syarat-syarat kontrak terdahulu dengan AIMS Data Centre 2 dan kontrak seterusnya dengan pemohon. Oleh itu, rayuan ini. Isu-isu utama yang dibangkitkan oleh pemohon adalah berkaitan: (i) entiti berasingan dari segi undang-undang; (ii) sama ada kontrak-kontrak pekerjaan tersebut adalah kontrak tempoh tetap; dan (iii) sama ada responden, seorang warga asing, boleh menjadi pekerja tetap.

**Diputuskan (membenarkan rayuan dengan kos; mengetepikan keputusan Mahkamah Tinggi)**

**Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:**

**(1)** Perayu dan AIMS Data Centre 2 ialah dua entiti undang-undang berasingan. Oleh itu, kontrak pekerjaan enam bulan responden dari 1 Oktober 2009 sehingga 31 Disember 2013 dengan dua entiti undang-undang berasingan tidak boleh dianggap sebagai satu kontrak bersambungan dengan pemohon. Penggunaan terma 'renewal' dan tiada perubahan terma-terma dan syarat-syarat kontrak terkemudian daripada kontrak terdahulu tidak menyebabkan pekerjaan berterusan kerana fakta penting kekal bahawa kedua-dua kontrak dimasuki dengan entiti undang-undang berasingan. Selanjutnya, tiada keterangan bahawa fakta-fakta kes ini menunjukkan fraud atau tindakan tidak berpatutan oleh pemohon dan oleh itu, tiada alasan untuk Mahkamah Perusahaan atau HMT menyingkap tirai penubuhan AIMS Data Centre 2 dan pemohon untuk menganggap kedua-dua entiti sebagai satu.

**(2)** Kontrak pekerjaan pertama hingga ketiga adalah antara responden dan AIMS Data Centre 2. Kontrak-kontrak pekerjaan yang penting dalam rayuan ini hanya antara pemohon dan responden iaitu kontrak keempat hingga keenam dan setiap satu kontrak menyatakan tawaran lantikan adalah untuk tempoh tertentu. Oleh itu, kesimpulan yang tidak boleh dinafikan adalah kontrak-kontrak pekerjaan responden dengan pemohon adalah kontrak terma tetap. Kontrak terma tetap akan luput apabila tempohnya tamat.

**(3)** Sebelum kontrak keempat dengan pemohon luput, pemohon telah menawarkan responden kontrak kelima, yang tidak disetujui responden. Oleh itu, pada ketika itu, hanya kontrak keempat masih berkuat kuasa. Kemudian, pada 18 September 2013, sebelum kontrak keempat luput, responden ditawarkan kontrak tiga bulan untuk tempoh dari 1 Oktober 2013 hingga 31 Disember 2013. Responden menerima kontrak tiga bulan itu pada 20 September 2013. Pada 1 Oktober 2013, apabila responden memaklumkan pada pemohon bahawa dia tidak menerima kontrak kelima, kontrak yang berkuat kuasa, iaitu kontrak keempat, luput kerana tempohnya telah tamat. Oleh itu, hanya kontrak tiga bulan dari 1 Oktober 2013 hingga 31 Disember 2013 berkuat kuasa antara pemohon dan responden. Dalam tempoh kontrak tiga bulan inilah, pada 18 Oktober 2013, responden mengeluarkan surat 'pelepasan awal', memberikan pemohon dua bulan notis penamatan kontrak tiga bulan berkuat kuasa dari 1 November 2013 hingga 31 Disember 2013.

**(4)** Hakim Mahkamah Tinggi, apabila memutuskan kontrak pekerjaan responden dengan pemohon adalah kontrak tetap, tanpa memeriksa terma-terma dan syarat-syarat kontrak yang relevan yang jelas menyatakan terma tetap kontrak dengan klausa penamatan yang boleh dibuat oleh sama ada pemohon atau responden, telah melakukan kekhilafan yang mewajarkan campur tangan rayuan. Responden dilantik bawah terma kontrak tetap tiga bulan dan penamatan awal responden dilakukan menurut kl. 8 kontrak.

**(5)** Responden adalah dan masih warganegara Singapura. Dalam Lampiran A 'Tenure and Terms' kontrak tiga bulan tersebut, kl. 1(a) menyatakan bahawa kontrak 'subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia'. Ini termasuk keperluan undang-undang untuk memperoleh permit kerja daripada jabatan-jabatan relevan. Oleh itu, seorang ekspatriat yang memerlukan permit kerja untuk bekerja di Malaysia tidak boleh menjadi pekerja tetap.

**Case(s) referred to:**
*Law Kam Loy & Anor. v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA* ***(refd)***
*M Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor [2003] 5 CLJ 448 HC* ***(refd)***
*Mong Pak Nyong v. IJM Plantations Bhd [2010] 2 LNS 0657* ***(refd)***
*Nasha'at Muhy Mahmoud v. Malaysian Airlines System Bhd [2013] 2 LNS 1745* ***(refd)***
*Toko Inomoto & Ors v. Malaysian Philharmonic Orchestra [2015] 2 LNS 1034* ***(refd)***

**Legislation referred to:**
Industrial Relations Act 1967, s. 20

*For the appellant - M/s Shearn Delamore & Co*
*For the respondent - M/s Bodipalar Ponnudurai De Silva*

*[Editor's note: Appeal from High Court, Kuala Lumpur; Judicially Review No: WA-25-117-07-2016 (overruled).]*

*Reported by S Barathi*

## JUDGMENT

**Badariah Sahamid JCA:**

### Introduction

**[1]** This is an appeal against the decision of the learned High Court Judge, delivered on 24 August 2017, which dismissed the appellant's application for an order of *certiorari* to quash the entire decision of the Industrial Court in Award No. 382 of 2016 which found the respondent's dismissal from the applicant's employment to be without just cause or excuse. The Industrial Court had awarded back wages of twenty-four (24) months and compensation of one and a half month's salary for each year of the respondent's completed service *in lieu* of reinstatement.

### Issue

**[2]** The primary issue before the Industrial Court, the High Court as well as before us was whether on the facts and circumstances of this case, the respondent was employed on a fixed term contract or was a permanent employee of the appellant at the material time? In this respect, both the Industrial Court and the High Court made concurrent findings that the respondent was a permanent employee of the appellant and in consequence thereof, his termination was invalid.

### Background Facts

**[3]** The following salient facts are undisputed. For ease of reference, parties will be referred to as they were in proceedings before the High Court.

**[4]** The respondent had entered into a total of six contracts of employment that was considered by both the Industrial Court and the High Court. It is to be noted that chronologically the first three contracts were with AIMS Data Centre 2 Sdn Bhd, while the fourth to the sixth contracts were with the applicant, AIMS Cyberjaya Sdn Bhd.

**[5]** The six employment contracts are as follows:

(i) first contract: From 1 October 2009 (on six months' probation) as a consultant with Aims Data Centre 2 Sdn Bhd. (pp. 129-136 RR);

(ii) second contract: From 1 October 2009 to 30 September 2010, as a consultant with AIMS Data Centre 2 Sdn Bhd. (pp. 137-144 RR);

(iii) third contract: From 1 October 2009 (on six months' probation) as Vice President, Product Development with AIMS Data Centre 2 Sdn Bhd (pp. 145-151 RR);

(iv) fourth contract: From 1 October 2012 to 30 September 2013 (12 months) as a consultant with AIMS Cyberjaya Sdn Bhd (p. 123 RR);

(v) fifth contract: From 1 October 2013 to 30 September 2014 (12 months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd (pp. 110-116 RR); and

(vi) sixth contract: From 1 October 2013 to 31 December 2013, (three months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd (pp. 103-109 of RR).

**[6]** Sometime in September 2013 during the duration of the fourth contract, the respondent received a letter from the applicant dated 10 September 2013 which offered him appointment under the fifth contract. The respondent had informed the applicant that he was unhappy with the terms of the fifth contract as the said contract had excluded the performance bonus scheme.

**[7]** After a discussion on 13 September between the respondent and the applicant, the applicant offered the respondent the sixth contract for a term of three months. According to the applicant, the three-month contract period from 1 October 2013 to 31 December 2013 was to provide the respondent time to reconsider the terms of the fifth contract.

**[8]** On 1 October 2013, the respondent informed the applicant that he was not accepting the fifth contract. Pursuant thereto, the applicant issued a letter dated 18 October 2013 which provided the respondent with an early release of his employment with the applicant with effect from 19.10.2013. The respondent was paid his full salary for the month of October 2013 as well as two months salary for the balance of the remaining two months *viz*. November and December *in lieu* of notice under the sixth contract. The respondent accepted the aforementioned payments.

**[9]** The respondent thereafter made representations under s. 20 of the Industrial Relations Act 1967 for the matter to be referred to the Industrial Court. The Industrial Court delivered its decision in favour of the respondent in Award No. 382 of 2016 dated 1 April 2016. The applicant applied for an order of *certiorari* to quash the entire decision of the Industrial Court. The High Court dismissed the applicant's application. Thus, the appeal before us.

**Findings And Decision Of The High Court**

**[10]** The findings and decision of the High Court may be summarised as follows. The High Court agreed with the finding of the Industrial Court that the respondent's contracts of employment with the applicant, AIMS Cyberjaya Sdn Bhd was a continuation of the respondent's contract of employment with AIMS Data Centre 2 Sdn Bhd, with no change in the terms and conditions of the previous contract of employment with AIMS Data Centre 2 Sdn Bhd and the subsequent contracts of employment with the applicant, AIMS Cyberjaya Sdn Bhd. The learned High Court Judge had stated thus at paras. 11 to 13 in Her Ladyship's 'grounds of judgment':

> 11. Accordingly, the Industrial Court was not found to have erred in its conclusion that the Respondent was a permanent employee of the Applicant and not its consultant and, that the Respondent's contract of employment with the Applicant from 1 October 2012 was, in effect a continuation of the Respondent's employment with ADC2" (AIMS Data Centre 2 Sdn Bhd).
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> 12. The Respondent's original contract of employment dated 27 May 2009 with ADC2 did not provide for a fixed term contract but, was found to have been continuously renewed without any intermittent breaks since 2010.
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> 13. Based on the Respondent's first contract of employment with the Applicant dated 18 October 2012, no changes was found in the terms and conditions of the Respondent's "renewed" employment from that of the Respondent's contract of employment dated 26 August 2009. Thus, the Respondent's contract of employment was rightly found by the Industrial Court to have been automatically executed by the Applicant and, not renewed pursuant to the Respondent's application. The Respondent's contract with the Applicant was clearly, a continuous and, successive contract with no intermittent breaks in between the preceding and the "successor contract".

**Our Judgment**

**[11]** After careful consideration of the written and oral submissions of learned counsel as well as the appeal records and relevant authorities, we are of the considered opinion that there are merits in this appeal. We therefore allow the applicant's appeal against the decision of the learned High Court Judge to dismiss the applicant's application for a *certiorari* to quash the decision of the Industrial Court. Our reasons are stated below.

**[12]** Our reasons will focus on three main issues that were raised by the appellant/applicant in their memorandum of appeal:

(i) the issue of separate legal entity;

(ii) the issue of whether the contracts of employment are fixed term contracts; and

(iii) the issue of whether the respondent who is a foreign national, can be a permanent employee.

*Separate Legal Entity*

**[13]** We agree with the submission of the applicant that the Industrial Court and the High Court had erred in law and fact in making the finding that the respondent's contract of employment with the applicant from 1 October 2012 was a continuation of the respondent's employment with AIMS Data Centre 2 Sdn Bhd in 2009. It is trite law that the applicant and AIMS Data Centre Sdn Bhd were two separate legal entities. Thus, the respondent's six contracts of employment from 1 October 2009 to 31 December 2013 with two separate legal entities cannot be treated as one continuous contract with the applicant.

**[14]** In disregarding the separate legal entity of AIMS Data Centre 2 Sdn Bhd and the applicant, AIMS Cyberjaya Sdn Bhd, the learned High Court Judge had taken into account the irrelevant factor that the respondent's contracts of employment had been 'renewed' successively every year since 2010 without a break although the renewals were made by two separate legal entities.

**[15]** The learned High Court Judge also took into account the irrelevant factor that the first contract with the applicant dated 18 October 2012 was headed "Renewal of Contract" and stated that the respondent's contract would be "renewed for 12 months" (1 October 2012 to 30 September 2013) and that, "with this renewal, there shall be no change in your designation, grade and other terms and conditions of your contract dated 26 August 2009". The foregoing utilisation of the term "renewal" and the non-change of terms and conditions of a subsequent contract to the previous contract does not result in a continuous employment as the material fact remains that both contracts were entered with two separate legal entities.

**[16]** Established authorities have held that there must be special circumstances, where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity that warrants the lifting of the corporate veil by either the Industrial Court or the High Court. (Refer to *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355).

**[17]** There is no evidence that the facts of the instant case demonstrate fraud or unconscionable conduct of the applicant and neither did the learned High Court Judge address this matter in her 'grounds of judgment'. Thus, there are no grounds for the Industrial Court or the learned High Court Judge to lift the corporate veils of AIMS Data Centre 2 Sdn Bhd and the applicant, AIMS Cyberjaya Sdn Bhd to treat the two separate entities as one ie, the applicant, AIMS Cyberjaya Sdn Bhd.

*Fixed Term Contracts*

**[18]** In light of the above, the pertinent contracts of employment can only be between the applicant and the respondent ie, the fourth to the sixth contracts as aforesaid.

(i) The fourth contract: From 1 October 2012 to 30 September 2013, (12 months) as a consultant with AIMS Cyberjaya Sdn Bhd. (p. 123 RR);

(ii) The fifth contract: From 1 October 2013 to 30 September 2014, (12 months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd. (pp. 110-116 RR);

(iii) The sixth contract: From 1 October 2013 to 31 December 2013, (three months) as Vice President, Products & Solutions with AIMS Cyberjaya Sdn Bhd. (pp. 103-109 of RR).

For the purposes of this appeal, the earlier contracts of employment between the respondent and AIMS Data Centre 2 Sdn Bhd (first to third contracts) must be disregarded.

**[19]** The next question to ask is this: Are the three contracts abovementioned fixed term contracts or are the terms in the nature of a permanent employment with the applicant?

**[20]** A perusal of each of the three contracts abovementioned stipulates the offer of appointment was for a specified period of time. The fourth contract stipulates the period of 12 months from 1 October 2012 to 30 September 2013. The fifth contract also stipulates a period of 12 months also from 1 October 2013 to 30 September 2014. The sixth contract stipulates a period of three months from 1 October 2013 to 31 December 2013. Thus the inescapable conclusion is that the employment contracts of the respondent with the applicant were fixed term contracts. A fixed term contract expires by effluxion of time. (Refer to *M. Vasagam Muthusamy v. Kesatuan Pekerja-Pekerja Resorts World, Pahang & Anor* [2003] 5 CLJ 448; *Mong Pak Nyong v. IJM Plantations Bhd* [2010] 2 LNS 0657).

**[21]** Prior to the expiry of the first contract with the applicant (also referred to as the fourth contract), by letter dated 10 September 2013, the applicant had offered the respondent another contract also for a period of 12 months from 1 October 2013 to 30 September 2014 (also referred to as the fifth contract). The respondent was not agreeable to the fifth contract as it did not provide for a sales performance bonus. At this point therefore, the only subsisting contract between the respondent and the applicant was the fourth contract which had stipulated a fixed term from 1 October 2012 to 30 September 2013.

**[22]** Subsequently, prior to the expiry of the fourth contract, on 18 September 2013, the applicant had offered the respondent a three-month contract for the period 1 October 2013 to 31 December 2013 (also referred to as the sixth contract). The respondent accepted the three-month contract on 20 September 2013. However, on 1 October 2013, the respondent informed the applicant he was not accepting the fifth contract. At this point the subsisting contract (the fourth contract) had already expired by effluxion of time. What remained between the applicant and the respondent was only

A the three-month contract from 1 October 2013 to 31 December 2013. It was during the duration of this three-month contract, on 18 October 2013 that the respondent had issued a letter of "early release", giving the applicant two months' notice of expiry of the three months' contract with effect from 1 November 2013 to 31 December 2013.

B **[23]** The question arises whether the applicant was entitled to unilaterally terminate the three-month contract before its expiry date? The answer to this question must be found in the terms and conditions of the contract therein.

**[24]** Appendix A provides the tenure and terms of the contract. Among the relevant terms are as follows:

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> 1. a) Your contract with AIMS Cyberjaya Sdn Bhd shall commence from 1 October 2013 for a period of 3 months ending 31 December 2013 subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia. This contract shall automatically terminate upon the expiry of the Contract term unless extended or renewed
>
> D accordance with the provisions of clause 8.
>
> In respect of termination, clause 1. (d) provides that either the Respondent or the Applicant may terminate the contract in accordance with clause 8 which provides as follows:
>
> **8. Termination**
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> E
>
> Your appointment may be terminated by giving two (2) months' notice. Such notice shall be given by the party that intends to effect termination. Where no notice is given, two (2) months salary *in lieu* of notice shall be payable by the party effecting such termination.

F **[25]** It is clear from the above that the respondent was appointed under a fixed term contract of three months and that the early termination of the respondent was effected in accordance with cl. 8 thereof. In addition, thereto, cl. 1(e) had expressly confined the terms of the contract to Appendix A as follows:

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> 1. (e) This contract shall supersede all other contracts previously issued under AIMS Data Centre 2 Sdn Bhd and AIMS Data Centre Pte. Ltd.

**[26]** It is unfortunate that the learned High Court Judge had concluded that the respondent's contract of employment with the applicant was a permanent contract without examining the terms and conditions of the relevant contract
H which had expressly stipulated a fixed term contract with a termination clause that can be effected by either the applicant or the respondent. The learned High Court Judge had thus committed errors that warrant appellate intervention.

*Can A Foreign National Be A Permanent Employee?*

I

**[27]** In our view, the status of the respondent as an employee on a fixed term contract or a permanent employee of the applicant can and has been determined by the facts and circumstances of the case as well as the specific

terms and conditions of the material contracts. However, for the sake of completeness, we will deal with the issue of whether a foreign national can be a permanent employee of a Malaysian company?

**[28]** It is not disputed that the respondent was and is a citizen of Singapore. The question that arises is whether the respondent who was a foreign national can be a permanent employee of the applicant? We note that neither the Industrial Court nor the learned High Court Judge had addressed this issue although it was a relevant factor in determining whether the respondent was a permanent employee.

**[29]** In respect of an expatriate employee, authorities have held that there cannot be a permanent employment. In the case of *Nasha'at Muhy Mahmoud v. Malaysian Airlines System Bhd* [2013] 2 LNS 1745 which was also referred to in the case of *Toko Inomoto & Ors v. Malaysian Philharmonic Orchestra* [2015] 2 LNS 1034 (recently affirmed by the High Court in Suit No. 25-300-11-2015), the case involved a pilot who was a foreign national who was engaged under a series of successive contracts which had been renewed several times. He claimed that he was a permanent employee. The learned Chairman Nayagam held that:

> This is the normal practice where companies employ foreigners to work for them as a stop gap measure as it requires a valid work pass, which is only for a limited period and can be cancelled if there has been a breach of any condition attached to it. This is reason the claimant's contracts were subject to him obtaining a work pass. In the circumstances, it is not reasonable for the claimant as a foreign workman to say that he expected to work in Malaysia on a permanent basis, just because his fixed term contract was renewed.

**[30]** In the instant case, we note that in Appendix A of the tenure and terms of the three-month contract between the applicant and the respondent, cl. 1. (a) stipulates that the contract was "subject to compliance of any legal requirements necessary for you to be able to provide services in Malaysia". This would include the legal requirement to obtain a work permit from the relevant departments. Thus, it cannot be said that an expatriate who requires a work permit to work in Malaysia can be a permanent employee.

**[31]** In conclusion, for the foregoing reasons, we are of the considered view that there are appealable errors in the concurrent findings of the Industrial Court and the High Court which warrant appellate intervention. The decision of the High Court dismissing the applicant's application for an order of *certiorari* is set aside. Accordingly, we allow this appeal with costs.